

EMPLOYMENT STANDARDS TRIBUNAL
In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C. 113

- by -

Cast-All Concrete Ltd.
("Cast-All")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: David Stevenson

FILE NO.: 98/94

DATE OF HEARING: April 27, 1998

DATE OF DECISION: May 11, 1998

DECISION

APPEARANCES

for the appellant:	Victor Pukas
for the individual	in person

OVERVIEW

This decision involves an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) by Cast-All Concrete Ltd. (“Cast-All”) from a Determination made by a delegate of the Director of Employment Standards (the “Director”) dated January 21, 1998 in which the Director concluded Cast-All had contravened Section 63 of the *Act* by failing to pay length of service compensation to Alan Newman (“Newman”). The Director ordered Cast-All to pay an amount of \$4998.96 in respect of the contravention. Cast-All says this Determination is in error because Newman quit.

ISSUE TO BE DECIDED

The issue here is whether Cast-All can show Newman discharged it from the obligation to pay length of service compensation by terminating his own employment with Cast-All.

FACTS

The business year of 1996 was a bad one for Cast-All. In November, 1996, Victor Pukas (“Pukas”), the owner and president of Cast-All was informed by his Office Manager that the business was operating at a significant financial loss. He decided that some steps designed to reduce the operating costs of the business were necessary for its continued survival.

Newman, who was in charge of all maintenance and mechanical operations for Cast-All, was one of two key employees of the business. On or about December 20, 1996, Pukas met with the two key employees and described to them the bleak financial picture of Cast-All. He told them that part of his attempts to get costs under control would involve some changes to their conditions of employment. Until that time both employees had received, as part of their compensation package, a vehicle, whose lease cost, insurance, maintenance, repairs and fuel were fully paid by Cast-All. As well Cast-All allowed both employees to fuel and repair their spouse’s vehicle at Cast-All’s expense. On December 20 Pukas told Newman and the other employee that effective January, 1997 the vehicles would be

recalled and all privileges associated with the vehicles would be canceled. Pukas also told each employee they would have the option of purchasing the vehicles or assuming the lease and they should make a decision about that. Finally, Pukas told them the business would be shutting down completely during the Christmas season. Pukas says Newman was told the business would re-open the Monday of the first full week in January. Newman says he was told he was laid off indefinitely.

While Cast-All had often closed for the Christmas season, this was the first time during his employment with Cast-All that Newman had been laid off during this period. In previous years he had continued to work during this time servicing some of the equipment that was operated continuously.

What happened in early January was the subject of considerable controversy between Pukas and Newman. There are, however, a few areas of agreement. Pukas and Newman agree that there were several telephone calls and one meeting between them during the period January 3 and January 15. The telephone calls are recorded in a telephone bill covering the period. The meeting took place on January 10. They also agree that after January 15 there was no further communication or attempted communication between them.

Pukas says that during the telephone call on January 7, Newman told him he had found another job and would not be returning to Cast-All. That telephone discussion, along with his assertion that Newman had removed his tool box from the shop sometime prior to January 3 and had not shown up for work on January 6, forms the basis for the contention that Newman terminated his own employment and is not entitled to length of service compensation.

Newman says nothing about any telephone discussion on January 7, either in his submission to the Tribunal or in his evidence. His first specific reference to any discussion in January between he and Pukas is January 9, when he says Pukas called to ask for a meeting on January 10. That meeting took place in the afternoon of January 10. He says a number of things about the meeting: first, he says Pukas was intoxicated and abusive, saying he was unhappy with Newman's work and he should seriously look for other employment; second, he says he agreed to buy out the lease on the rental vehicle; and, third, there was agreement that he would be paid \$19.00 an hour, inclusive of medical and dental coverage.

Pukas acknowledged that meeting in his evidence, although he said nothing of it in his appeal submission. In his evidence he said it was to further discuss the changes he told Newman in December were going to take place and which he and Newman had already had some discussion on January 3. During the January 3 discussion he says Newman told him he wanted \$21.50 an hour plus benefits. In reply, Pukas told him he wanted to adjust his salary to the industry standard, which he said was \$18.00 to \$19.00 an hour, and suggested Newman "check around". Newman was offended, indicating he felt the wages suggested were not fair. Pukas says Newman did leave the impression he would take over the truck. The January 10 meeting was a follow up to that earlier discussion and, according to Pukas, it got heated at times, with "things being said". There was discussion

about wages, but he does not recall any agreement coming from that meeting on a wage rate. Newman confirmed he was going to take over the truck.

There were two more telephone discussions after the meeting.

Newman says both discussions were essentially identical. Pukas was again intoxicated and abusive, accusing Newman of removing a tiger torch from the shop. Pukas told him again he was unhappy with his work and he should look for work elsewhere, although he says he also asked him to come in and negotiate wages. He testified he told Pukas during the January 14 telephone call that he had found temporary employment elsewhere. In his submission to the Tribunal he says he conveyed that information to the secretary in the office on January 15 when he went in to pick up his tools. There is no indication in his submission he ever conveyed that information to Pukas.

Pukas says both those discussions were to inquire of Newman about a missing tiger torch, nothing more.

In late December or early January Newman asked Steve Hobbs, Sales Manager for Cast-All, for a letter of reference. He called Mr. Hobbs at home to request it. It was given and is dated January 2, 1997.

ANALYSIS

To a large degree, the evidence is quite unsatisfactory and I am troubled by many aspects of it. Ultimately, however, it comes to this: Cast-All has not demonstrated Newman terminated his employment. I do not accept that Newman told Pukas on January 7 that he had found a new job and would not be returning to Cast-All. If that were so, why did Pukas continue with the meeting of January 10, not just holding the meeting, but making two telephone calls, January 9 and 10 to confirm it and remind Newman of it? That meeting would not have been necessary, particularly if, as Pukas says, there was considerable discussion about wages. It would have been easy enough to confirm Newman's intention to take over the truck without the requirement of a meeting. Newman was a key employee. It is not reasonable, had Newman told Pukas on January 7 he was not returning to Cast-All, that there would not have been some serious discussion about that, either during the meeting or in other conversations, but there was none.

There is no dispute that Cast-All made no attempt to recall Newman to work after his lay off on December 20. In this appeal they rely entirely on their claim that Newman terminated his own employment so there was no need to attempt to recall him.

Section 63 of the *Act* says an employer is liable to compensate an employee for length of service after 3 consecutive months of employment. Subsection 63(3) says an employer is deemed to be discharged from that liability if the an employee is given notice and/or compensation or if the employee self terminates employment, retires from employment or gives just cause for dismissal.

While the *Act* uses the word “terminate” in paragraph 63(3)(c) to describe one of the ways by which an employer could effect a discharge of the statutory liability of an employer to give notice and/or compensation, the term is intended to capture any manner by which an employee chooses to end the employment relationship. Labour relations concepts such as abandonment, resignation and voluntary termination or severance of employment are all notions caught by the term. To the lay person, however, it is simply known as a “quit”.

The position the Tribunal takes on the issue of a quit is now well established. It is consistent with the approach taken by Labour Boards, arbitrators and the Ontario Employment Standards Tribunal. It was stated as follows in the Tribunal’s decision *Burnaby Select Taxi Ltd. -and- Zoltan Kiss*, BC EST #D091/96:

The right to quit is personal to the employee and there must be clear and unequivocal facts to support a conclusion that this right has been exercised by the employee involved. There is both a subjective and an objective element to a quit: subjectively, the employee must form an intent to quit; objectively, the employee must carry out some act inconsistent with his or her further employment.

In the circumstances of this case, I cannot find the necessary “clear and unequivocal” facts to support a conclusion that Newman quit his employment with Cast-All. Simply put, I do not accept that Newman ever told Pukas, or anyone else at Cast-All, that he had found other employment and was not returning to work there.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated January 21, 1998 be confirmed in the amount of \$4998.96 together with whatever further interest that may have accrued, pursuant to Section 88 of the *Act*, since the date of issuance.

David Stevenson
Adjudicator
Employment Standards Tribunal